96 No. 96-756

Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

HOUSE OF LLOYD, INC.,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DONALD L. JAMES
Counsel of Record
DAVID R. BUCHANAN
JOHN S. ROLLINS
BROWN & JAMES, P.C.
Attorneys for Respondent
1100 Main Street, Suite 1900
Kansas City, Missouri 64105
(816) 472-0800

9954
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

17 pp

QUESTION PRESENTED

Whether the appropriate standard of appellate review in a summary judgment case based on stipulated facts where only legal issues are determined by the District Court is "*de novo*" or "clearly erroneous."

LIST OF PARTIES

The names of all parties to the proceedings in the Court of Appeals whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of either petitioner or respondent required to be listed.

APPENDIX

Citations to the Appendix are to the appendix to the Petition for Writ of Certiorari and no separate appendix is filed by Respondent.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Appendix	iii
Table of Contents	iv
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Denying the Writ	4
I. The Court of Appeals applied the appropriate standard of review when it reviewed the district court's judgment *de novo.*	4
A. The district court's judgment was based solely on the legal issue of the meaning of Federal's policy and therefore *de novo* review was proper.	6
B. The Court of Appeals' opinion was based solely on the legal issues and therefore *de novo* review was proper.	7

Contents

	Page
1. The Court of Appeals' only inquiry was the meaning of Federal's policy which is a purely legal issue.	7
2. The Court of Appeals did not disturb any factual findings of the district court.	8
C. House of Lloyd's Argument.	10
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Folger Coffee v. Great American Ins. Co., 333 F. Supp. 1272 (W.D. Mo. 1971) 3, 6, 9

In re U.S. Financial Securities Litigation, 729 F.2d 628 (9th Cir. 1984) 5, 9, 10

May v. Nevada Irrigation District, 600 F.2d 1280 (9th Cir. 1979) 5, 10

Statute Cited:

28 U.S.C. § 1254(1) 1

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 86 F.3d 847 and is reproduced in the appendix to the Petition at 2a. Unreported opinions of the District court in this case are reproduced in the appendix to the Petition at 15a and 24a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 25, 1996. The Court of Appeals denied House of Lloyd, Inc.'s petition for rehearing and suggestions for rehearing en banc on August 12, 1996. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On April 28, 1987, House of Lloyd, Inc. ("House of Lloyd") entered into a contract with Versa Corporation ("Versa") whereby Versa agreed to supply and install conveyor subsystems at House of Lloyd's distribution facility located in Grandview, Missouri. On November 27, 1987, after Versa delivered the conveyor subsystems and while Versa was in the process of installing such conveyor subsystems, the conveyor subsystems were damaged or destroyed in a fire at the distribution facility.

A policy of insurance issued by Federal Insurance Company ("Federal") to Versa was in effect at the time of the fire. The Federal policy included an "Installation Form," which provided:

> 1. PROPERTY COVERED
>
> This policy insures the property of the Insured and the property of others for which the Insured may be liable, consisting

> principally of mechanical material handling equipment and metal products.
>
> all intended for installation at: various locations.

House of Lloyd brought the present action in federal district court on the basis of diversity jurisdiction asserting two breach of contract claims against Versa (Counts I and II) and an alternative breach of contract claim against Federal (Count III).

Counts I and II of the complaint alleged that Versa bore the risk of loss for the conveyor subsystems at the time of the fire. Count III was an alternative claim against Federal in the event that the district court ruled in favor of Versa on the risk of loss issue. House of Lloyd claimed that even if the risk of loss for the conveyor subsystems had passed to House of Lloyd at the time of the fire, Federal still owed coverage for the loss because the conveyor subsystems were "the property of others [House of Lloyd] for which [Versa] may be liable."

In the course of litigation, the parties agreed to first have the risk of loss issue (Counts I and II) tried by the court. Then, depending on the outcome on that issue, a second trial would be held on the coverage issue.

By consent of the parties, the first trial was conducted by a magistrate judge. On June 7, 1993, the magistrate judge ruled that Versa was not liable to House of Lloyd because the risk of loss for the conveyor subsystems passed to House of Lloyd upon delivery.[1] Thus, House of Lloyd proceeded with its claim against Federal under the "Installation Form."

---

1. House of Lloyd did not appeal the magistrate's determination of the "risk of loss" issue.

Federal did not dispute that in accordance with the terms of the "Installation Form," the conveyor subsystems were the "property of others [House of Lloyd] . . . consisting principally of mechanical, material handing equipment and metal products all intended for installation at various locations." Nor did Federal dispute that Versa was responsible for installation of the conveyor subsystems at the time of the loss. Federal's sole contention was that the loss of the conveyor subsystems was covered only if Versa was liable for the loss.

At the pretrial conference, the district court judge, the Honorable Howard F. Sachs, ordered the parties to submit a set of stipulated facts with supporting documentation. In addition, Judge Sachs ordered extensive briefing on the legal issue of whether Federal's policy provided coverage.

In his Order dated September 26, 1994, Judge Sachs, relying on *Folger Coffee Co. v. Great American Ins. Co.*, 333 F. Supp. 1272 (W.D. Mo. 1971), ruled that coverage of property "for which the Insured (Versa) may be liable . . ." must be construed as covering property for which Versa had assumed "responsibility," regardless of its "legal liability" for the loss.[2]

On appeal, the United States Court of Appeals for the Eighth Circuit specifically determined that "[t]he disposition of this case turns on the legal effect of the . . . Installation Floater of the Federal policy." (App. B, 7a). It accepted as true all of the facts emanating from the district court. (App. B, 7a). It then

---

2. Judge Sachs then invited briefing by the parties regarding the portion of the loss to be borne by Federal. The total loss was a stipulated amount and the damages issue was a legal issue of how much of the loss Federal owed in light of "other insurance" clauses contained in both Federal's policy and in the Travelers policy that had already paid House of Lloyd for its loss. On January 26, 1995, Judge Sachs found that Federal was liable for $1,045,884.05.

utilized a *de novo* standard of review in finding that Federal's policy language was unambiguous (App. B, 11a-12a), that the district court misinterpreted Folger Coffee (App. B, 13a-14a), and that "the district court erred in concluding that the Federal policy covered Lloyd's loss in the present case." (App. B, 11a). Accordingly, the Court of Appeals reversed the judgment of the district court, and remanded this case to the district court with instructions to enter judgment for Federal (App. B, 14a).

REASONS FOR DENYING THE WRIT

The sole basis asserted by House of Lloyd in support of its petition is that the Court of Appeals utilized the incorrect standard of review in reversing the trial court and therefore created a conflict among the circuits as to what standard of review is to be applied in a case such as this. In support of this, House of Lloyd's lone argument is that the district court's judgment entailed certain findings of fact one of which was rejected by the Court of Appeals without a finding that it was clearly erroneous. However, the district court proceeding involved only legal issues. There were no factual issues decided by the district court. Consequently, only legal issues were reviewed by the Court of Appeals, a *de novo* standard of review was properly applied, and there is no divergence among the Circuits on this issue.

I.

THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW WHEN IT REVIEWED THE DISTRICT COURT'S JUDGMENT *DE NOVO.*

When an appellate court's review of a trial court's interpretation of a contract is limited to an analysis of the

language used in the contract, the issue of interpretation is a matter of law reviewed *de novo*. *In re U.S. Financial Securities Litigation*, 729 F.2d 628, 631-32 (9th Cir. 1984) (citation omitted). Likewise, where the "interpretation includes a review of factual circumstances surrounding the contract, the principles of contract interpretation applied to those facts present issues of law" which are also reviewed *de novo*. *Id.* at 632 (citation omitted). These rules almost always apply in a determination of whether an insurance policy provides coverage for a particular loss insofar as the first question in a coverage case is whether the policy is ambiguous and, if not, whether the unambiguous language encompasses the particular circumstances of the loss. This is precisely the case here.

The only time that a district court's interpretation of a contract is subject to review under a "clearly erroneous" standard is where the district court considers extrinsic evidence in making a factual determination as to the intent of the parties when they made the contract. *Id.* at 632 (citation omitted). This standard is almost never applied where the question is whether an insurance policy provides coverage because the only time the intent of the parties is relevant is where the contract is ambiguous. Typically, where an insurance policy is ambiguous it is simply construed against the insurer without inquiry into the intent of the parties.

In other words, where the issue is one of contract interpretation, the only circumstance in which the Court of Appeals is bound to a "clearly erroneous" standard of review is where it undertakes to review the district court's factual findings regarding the intent of the parties to an ambiguous contract. *See id.* at 632 (*quoting May v. Nevada Irrigation District*, 600 F.2d 1280, 1282 (9th Cir. 1979)). In all other circumstances the standard of review is *de novo*. *In re U.S. Financial Securities Litigation*, 729 F.2d at 631-32. Here, the district court did not make a factual determination of the intent of the parties.

Furthermore, the Court of Appeals found that Federal's policy was unambiguous and restricted its review to the language of the policy and the policy's application to the circumstances of the loss. Thus *de novo* review was proper.

A. The district court's judgment was based solely on the legal issue of the meaning of Federal's policy and therefore *de novo* review was proper.

The district court's only inquiry was whether the Federal policy provided coverage for House of Lloyd's loss. Because the parties stipulated to the facts, there were no facts for the district court to decide. The district court certainly did not make any finding as to the intent of the parties to the Federal policy.[3] Thus, the district court's inquiry was purely legal and subject to *de novo* review.

The precise issue in the district court was the meaning of the term "liable" as used in the Federal policy. The question was whether "liable" meant responsible for damages owed by the insured, as contended by Federal, or responsible for the property in any respect (*e.g.*, responsible for installation), as contended by House of Lloyd.

Resolution of this issue was not based on any factual determination. Rather, the district court's judgment was based strictly on an interpretation of Federal's policy language in light of *Folger Coffee Co. v. Great American Ins. Co.*, 333 F. Supp. 1272 (W.D. Mo. 1971). (*See* App. D, 26a-27a; *see also* App. 7a-10a, 13a-14a). This inquiry was entirely legal in nature. Thus, *de novo* review was proper.

---

3. In fact, one of the parties to the policy, Versa, was not even involved in the dispute between House of Lloyd and Federal.

B. The Court of Appeals' opinion was based solely on the legal issues and therefore *de novo* review was proper.

1. The Court of Appeals' only inquiry was the meaning of Federal's policy which is a purely legal issue.

Similarly, the Court of Appeals addressed only one question — whether Federal's policy provided coverage for the loss claimed by House of Lloyd. The determination of this issue was based on the interpretation of the phrase "for which the insured is liable" in Federal's policy. Such a question of pure contract interpretation is a question of law the determination of which is reviewed *de novo* by the Court of Appeals.

A review of the Court of Appeals' opinion demonstrates that the only question it addressed was the interpretation of Federal's policy. In fact, the Court of Appeals specifically stated as much at the outset of its opinion when it said:

> *Assuming as true the facts to which the parties have stipulated*, and the magistrate judge's uncontested finding that the risk of loss had passed from Versa to Lloyd upon delivery of the conveyor subsystems, we *determine de novo whether as a legal matter of contract interpretation, the Federal policy covered Lloyd's loss.*

(App. B, 7a) (emphasis added). Furthermore, the Court of Appeals' conclusion was simply that the "district court's interpretation of the Installation Floater is inconsistent with that provision's plain and ordinary meaning." (App. B, 11a). Finally, the Court of Appeals' only determination was

> that Lloyd's loss was not covered by the Federal policy by virtue of the Installation Floater. We hold that the relevant language of the Installation Floater . . . is clear and unambiguous: Federal must indemnify Versa for its liability arising out of the loss of or damage to property of others during installation.

(App. B, 12a).

Thus, the Court of Appeals limited its review to the purely legal question of the meaning of the policy language and specifically assumed as true all facts emanating from the district court. *De novo* review is proper under such circumstances, regardless of whether the procedural mechanism utilized by the district court was a bench trial or a motion for summary judgment, precisely because the only issues addressed were legal. Legal issues are always reviewed *de novo* in the courts of appeals.

2. The Court of Appeals did not disturb any factual findings of the district court.

Because the parties stipulated to all facts submitted to the district court, the district court made no findings of fact. Thus, there were no factual findings for the Court of Appeals to review. In fact, the Court of Appeals specifically assumed as true all of the facts emanating from the district court. (App. B, 7a).

The only issue raised by House of Lloyd is incorrectly characterized as involving a "question of fact." However, the only "factual finding" that House of Lloyd claims the district court made and the Court of Appeals rejected was that Versa "remained at least 'equitably' responsible for the property it

was to install. . . ." (Petition, p. 7). First, this fact is irrelevant to the inquiry because the responsibility for installation is not the same as the responsibility for a loss. Thus, this fact made no difference to the Court of Appeals' opinion.

Second, this was not a "finding of fact" made by the district court as the parties agreed that Versa had an ongoing responsibility for installation of the conveyors and this fact was not in dispute. The Court of Appeals specifically stated that it assumed this fact to be true. (App. B, 7a).

Third, even if this fact had been found by the district court, it has nothing to do with the intent of the parties. At most it is a surrounding circumstance to which "the principles of contract interpretation [would be] applied" in determining coverage. Thus, the Court of Appeals would review a coverage determination in light of this fact *de novo*. *In re U.S. Financial Securities Litigation*, 729 F.2d at 632.

Fourth, House of Lloyd has taken the Court of Appeals' statement out of context. The entirety of the Court of Appeals' statement is that "Versa was not legally or equitably 'responsible' for the conveyor subsystems within the meaning of *Folger Coffee*." (App.B, 13a-14a) (emphasis added). The Court of Appeals did not reject the fact that Versa "remained at least 'equitably' responsible for the property it was to install." (Petition, p. 7). Rather, the Court of Appeals accepted the fact that Versa was responsible for installation but made the purely legal observation that this would not make Federal responsible for the loss under *Folger Coffee*. In other words, the Court of Appeals simply rejected the district court's interpretation of *Folger Coffee*. It did not reject any facts emanating from the district court. Obviously, the interpretation of pertinent case law is a legal question and not a factual one.

The Court of Appeals' decision was based on its review of purely legal issues and not on the rejection of any factual findings of the district court. Therefore, application of the *de novo* standard of review was proper and *certiorari* should be denied.

C. House of Lloyd's Argument.

House of Lloyd suggests that *In re U.S. Financial Securities Litigation*, 729 F.2d 628, 632 (9th Cir. 1984), stands for the proposition that whenever a district court reviews extrinsic evidence in interpreting a contract, the Court of Appeals cannot reverse the district court's interpretation unless it is clearly erroneous. (Petition, p. 6). This is simply a misstatement of that case. To the contrary, *In re U.S. Financial Securities Litigation,* specifically limits this rule to situations where the district court makes a factual determination as to the intent of the contracting parties. *Id.* at 632 (*quoting May v. Nevada Irrigation District,* 600 F.2d 1280, 1282 (9th Cir. 1979)).

Here, the intent of the parties was not an issue and the district court made no factual finding as to the intent of the parties. Moreover, House of Lloyd does not claim that the Court of Appeals rejected a finding of fact as to the intent of the parties. Rather, the only factual finding that House of Lloyd argues the Court of Appeals rejected is that Versa was at least equitably responsible for the conveyors at the time of the loss. This fact was not "found" by the district court, rejected by the Court of Appeals nor even necessary to the Court of Appeals' opinion.

CONCLUSION

For the foregoing reasons, the proper standard of review was applied, there is no divergence among the Circuits, and the petition for writ of *certiorari* should be denied.

Respectfully submitted,

DONALD L. JAMES
Counsel of Record
DAVID R. BUCHANAN
JOHN S. ROLLINS
BROWN & JAMES, P.C.
Attorneys for Respondent
1100 Main, Suite 1900
Kansas City, Missouri 64105
(816) 472-0800